In The

Supreme Court of the United States

October Term, 1975

No. 75-1060

MARK METZGER and JOHN CLEMENTS,

Petitioners,

vs.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ALAN MANNING MILLER, P. C.
Attorney for Petitioners
71 North Main Street
Freeport, New York 11520
(516) 378-0070

(9151)
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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases Cited:

Contents

APPENDIX

Contents

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To: The Honorable, The Chief Justice of the United States, and the Associate Justices of the United States Supreme Court:

The petitioners, Mark Metzger and John Clements, respectfully pray that a writ of certiorari issue to review a

judgment and opinion of the New York State Court of Appeals entered in this proceeding on or about October 28, 1975, which reversed the Appellate Division of the New York State Supreme Court, Second Judicial Department and upheld a search of the petitioners' premises and the seizure of certain items therein.

OPINION BELOW

The opinion of the New York State Court of Appeals appears in the Appendix herein. The official citation of the case is 37 N.Y. 2d 675.

JURISDICTION

The opinion of the New York State Court of Appeals was entered on or about October 28, 1975. The judgment of the Appellate Division of the New York State Supreme Court, Second Judicial Department subsequent to that opinion and the order on remittitur of the Court of Appeals, was entered on or about December 15, 1975. This petition for certiorari is timely filed within ninety days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED

1. Whether, under the rulings of the Supreme Court in *Coolidge v. New Hampshire*, 403 U.S. 443, and *Chimel v. California*, 395 U.S. 752, the Court of Appeals should have

affirmed the decision of the Appellate Division of the New York State Supreme Court, Second Judicial Department and suppressed certain quantities of marijuana seized from the apartment of the petitioners after a general search, without an arrest warrant and without a search warrant.

2. Whether the New York State Court of Appeals has formulated a new standard in search and seizure matters in contravention of the safeguards of the Fourth Amendment of the Constitution of the United States and the standards set down in *Coolidge v. New Hampshire, supra.*

3. Whether a warrantless search of residential premises can be sustained without a showing by governmental authorities of the existence of any exceptional situation, or exigent circumstances.

4. Whether the new standard established by the New York State Court of Appeals of a search "consequential" to an arrest, violates the safeguards and the prohibition of the Fourth Amendment of the Constitution of the United States.

STATEMENT OF THE CASE

The petitioners were convicted in the County Court, Nassau County, (Honorable Alexander Vitale), on their plea of guilty at the conclusion of a suppression hearing in which they sought to suppress the use in evidence against them of a quantity of marijuana found in their residential premises following their arrest. Suppression was denied by the trial judge.

Thereafter, their conviction was unanimously reversed 5-0 by the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department (44 A.D. 2d 572, amended 45 A.D. 2d 719, amended 45 A.D. 2d 733).

Subsequently the New York State Court of Appeals reversed the Appellate Division in a 4-3 decision and sustained the findings of the trial court (37 N.Y. 2d 675).

Metzger and Clements resided in an apartment in Oceanside, New York.

An informant previously unknown to the police (seventeen years of age and without identification on his person) was engaged in conversation with undercover narcotic agents of the Nassau County Police Department and allegedly stated that he knew of a place where he could buy marijuana cigarettes.

The officers drove the youth to the apartment complex occupied by the petitioners (six buildings with approximately twelve apartments in each building) where the youth left the presence of the officers, was out of their sight for approximately ten minutes and then returned with three marijuana cigarettes, which he stated he had obtained in the petitioners' apartment.

The officers then went to the apartment, knocked on the door, which was opened by petitioner Clements, immediately placed him under arrest, entered the apartment, found the petitioner Metzger on the toilet, placed him under arrest, and brought both petitioners, handcuffed, into their living room.

In the living room, was a small glass bowl allegedly with a small quantity of marijuana in it.

With both petitioners secured and in custody, the officers then conducted a general search of the entire apartment and in a back bedroom, in a bottom dresser drawer, in the rear of the apartment, found a large quantity of marijuana, which is the subject of this proceeding.

The petitioners moved for a hearing to suppress this physical evidence as a result of the search and seizure, claimed to be in violation of their constitutional rights and in addition, claimed they were arrested without probable cause.

The occurrence took place in the mid-afternoon weekday of August 3, 1972, on a day in which it is undisputed that the courts were in session.

The arrests were effected without an arrest warrant and the search conducted after the petitioners were arrested, was conducted without a search warrant.

It was admitted that there was no personal surveillance of the apartment by the officers, that they had never seen the youth enter the petitioners' apartment, they did not know either the petitioners or the youth prior to the occasion in question, and that the general search of the apartment was made after the arrests, after the petitioners were secured, and in an area in the rear of the apartment which had never been entered by the officers prior to their search.

The petitioners entered a plea of guilty to one count of the three count indictment following the denial of the suppression in the trial court, with the expressed intention, on the record, of contesting the findings of the trial court.

The Appellate Division of the New York State Supreme Court, Second Judicial Department, unanimously reversed the conviction 5-0.

Leave to appeal to the Court of Appeals of the State of New York, was granted to the People by the Honorable Charles D. Breitel, Chief Judge of the State of New York and following the appeal, the Court of Appeals reversed the Appellate Division 4-3.

It is with that background that the writ for certiorari is sought before this Honorable Court.

REASONS FOR GRANTING THE WRIT

The opinion of the New York Court of Appeals would appear to be in direct conflict with the decisions of this Court in *Coolidge v. New Hampshire*, 403 U.S. 443, and *Chimel v. California*, 395 U.S. 752, which specifically defined not only the criteria necessary to justify any warrantless search within the safeguards of the Fourth Amendment of the United States Constitution, but also established the standards for what has come to be described as the "grab area."

The majority in the New York Court of Appeals has sought to establish a new exception to warrantless searches — as

described by Judge Wachtler, "a search consequential to arrest."

In so doing, the court has, in effect, overruled the dictates of the Supreme Court in *Coolidge, supra,* and *Chimel, supra.*

The decision below establishes new exceptions which go beyond *Katz v. United States,* 389 U.S. 347 and disregard the doctrine that such exceptions are to be "jealously and carefully done."

It would appear that this Court has already passed upon a fact situation similar to the case at bar, when it denied certiorari in *United States of America v. Cooks,* 493 F.2d 668, *cert. denied,* 420 U.S. 996.

In the *Cooks* case, the Circuit Court of Appeals for the Seventh Circuit sustained a suppression of the District Court of the Eastern District of Illinois under similar circumstances to the case at bar and discussed not only the area within a persons' immediate control, but quoted Mr. Justice Frankfurter to the effect that the security of a person's privacy against police intrusion is one of the foundations of a free society.

As Judge Wachtler of the New York Court of Appeals stated in his dissent, in *People v. Brosnan,* 32 N.Y. 2d 254, at 263, "We should not seek clear cut rules at the expense of constitutional safeguards (*Coolidge v. New Hampshire,* 403 U.S. 443, 483, 91 S. Ct. 2022, 29 L. Ed. 2d 564) . . . ."

In language almost tailored to the case now before the Court, Judge Wachtler stated in *Brosnan, supra,* at 264:

"District Attorneys are allowed to plead in the alternative in an ex post facto attempt to find a justification for the search that the court will accept," and went on to state (266-267), that "I believe the only workable and constitutional standard to apply in search and seizure cases is one which states that absent exigent or unusual circumstances, a law enforcement official must first obtain a warrant to conduct a search."

This Court has reiterated the established rule that "a search and seizure carried out on a suspect's premises, without a warrant, is per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions," and that "no amount of probable cause can justify a warrantless search absent exigent circumstances." *Coolidge v. New Hampshire, supra,* 403 U.S. 443, 468, 91 S. Ct. 2022, 29 L. Ed. 2d 564.

In the case on appeal, there were no "exigent circumstances" to justify the warrantless intrusion into the petitioners' property. If, in fact, they were dealing in marijuana and the police had just cause to suspect same, in the middle of a Thursday afternoon, they could have readily obtained a warrant to search the premises.

The police chose not to place the premises under observation and surveillance, or to follow any of the other standards of recognized police procedure before conducting the warrantless search without any regard for constitutional safeguards. Nor did the prosecution *ever* raise the question of "exigent circumstances" as justification for the search. That language was raised for the first time in the trial court's decision, without a shred of corroborative proof.

As this Court stated in *Coolidge v. New Hampshire, supra,* at 475-76:

> "The most common situation in which Fourth Amendment issues have arisen has been that in which the police enter the suspect's premises, arrest him, and then carry out a warrantless search and seizure of evidence. Where there is a warrant for the suspect's arrest, the evidence seized may later be challenged either on the ground that the warrant was improperly issued because there was not probable cause, or on the ground that the police search and seizure went beyond that which they could carry out as an incident to the execution of the arrest warrant. Where the police act without an arrest warrant, the suspect may argue that an arrest warrant was necessary, that there was no probable cause to arrest, or that even if the arrest was valid, the search and seizure went beyond permissible limits."

Coolidge, supra, makes it clear that the test of reasonableness of the arrest and the search cannot be applied after the fact when the police attempt to introduce the fruits of the search into evidence. The appropriate test is whether the arrest was warranted, whether it would have been reasonable to procure a search warrant and whether, in fact, the search was a reasonable search.

In *People v. Spinelli*, 35 N.Y. 2d 77, 358 N.Y.S. 2d 743, at 748, the New York Court of Appeals unanimously held:

> "The failure to secure a search warrant was by no means a sinister attempt on the part of the police officers to deprive an individual of his constitutional rights. But in an age of advancing technology the courts' vigilance in protecting a citizen's right to privacy becomes more necessary than ever before. The goal is not to protect criminals but to protect the standards of decency in our society."

In the instant case, the marijuana seized was in the back bedroom, at the end of a long hallway, and located in bottom dresser drawers, according to the testimony of the arresting officers. It was never in "plain view."

As established in *Spinelli, supra*, 358 N.Y.S. 2d 747: "The crux then is that there was ample time for the law enforcement officials to secure a warrant in order to make this significant intrusion onto defendant's premises." And yet the court departed from *Spinelli* and from the decisions of the Supreme Court in formulating the decision at bar.

This arrest occurred on a mid-week summer afternoon, when the courts were in session. Once the petitioners were arrested there was no justification for an exploratory, extensive, premises-wide search for evidence.

It has been well settled since *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685, that even the lawful arrest of an accused, if effected without an arrest warrant or a search warrant, will permit only a search of the defendant's person, and the immediate area within his reach from which he "might obtain weapons or evidentiary items" (395 U.S. at 766), the so-called "grab" area.

The apartment of the petitioners was on the second floor of a building in a complex of apartment houses. The police officers had never been there before. They knocked on the door, although their observation of the door indicated nothing at all unusual or suspicious. Likewise, when the door was opened, after Clements was under arrest, after the police officers had intruded into the hallway and towards the living room, they first made an observation of the interior which indicated items of a suspicious nature, to wit, the bowl in the living room with marijuana allegedly in it.

The bulk of the marijuana which made up the crux of the indictment, was found in the dresser of a back bedroom, down a hallway, at the far end of the apartment.

The standards for the issuance of a search warrant and the sufficiency of a search without a warrant have been the subject of substantial judicial decisions. *Agnello v. United States*, 269 U.S. 20; *Aguilar v. Texas*, 378 U.S. 108; *Spinelli v. United States*, 393 U.S. 10.

As Mr. Justice Goldberg stated in *Aguilar, supra*, that even if the facts are known to police officers which would be

sufficient in and of themselves to justify a magistrate to issue a warrant, the officers, without any warrant, are nonetheless restricted from making an illegal search (378 U.S. 111).

This Court has previously determined that states are free to develop their own standards for searches and seizures, so long as the conduct which is authorized, does not violate the Fourth Amendment of the United States Constitution. *Sibron v. State of New York*, 392 U.S. 40.

In the *Sibron* case, this Court reversed the New York State Court of Appeals, which attempted to forge new standards in a matter involving search and seizure, much the same as in the instant case.

It has long been established that the Fourth Amendment requires strict adherence to judicial process and that the burden is on those seeking the exceptions to show the necessity for those exceptions. *United States v. Jeffers*, 342 U.S. 48. In the instant case, there was no such showing.

If the decision of the Court of Appeals is upheld, then a new exception has been carved in the Fourth Amendment, and its guarantees and safeguards have been further eroded at the expense of the rights of the individual.

CONCLUSION

For all of these reasons, a writ of certiorari should be granted to review the judgment and opinion of the Court of Appeals of the State of New York.

Respectfully submitted,

s/ Alan Manning Miller
Attorney for Petitioners

APPENDIX

OPINION OF STATE OF NEW YORK COURT OF APPEALS

37 N.Y. 2d 675

Oct. 30, REC'D

No. 373

The People & c.,

Appellant,

vs.

John Clements and Mark Metzger,

Respondent.

(373)

Denis Dillon, District Attorney (William Donnino of counsel) for appellant.

Alan Manning Miller, Freeport, for respondent

JONES, J.

In the circumstances disclosed in this record we hold that, incident[1] to the arrest of defendants in their apartment, it was lawful for the police to seize the bricks of marijuana found in a closed dresser drawer as well as the marijuana and drug paraphernalia which were in plain view.

A named informer, apparently previously unknown to the police, but identified and still available, told officers with whom he was conversing that he knew where large quantities of marijuana could be purchased. When asked to do so the informer agreed to make a buy for the police. En route to the specified apartment, the informer further told the officers that bricks of marijuana were kept in the bottom drawer of a dresser in the apartment and described the precise location of that dresser.

On arriving at the apartment house, the officers searched the informer and then supplied him with a marked five-dollar bill. The informer proceeded to defendants' apartment, returning five to eight minutes later with three marijuana cigarettes. He told the officers that he bought only three cigarettes because the sellers began questioning him. At that he became nervous and when defendants left the room the informer left the apartment.

The police went to the apartment. When defendant Clements opened the door he was forthwith arrested and

1. The adjective "consequential" might be more accurate in this instance. The seizure here followed the arrest which provided the predicate for the lawful entry of the police into defendants' apartment. This seizure, however, does not fall within the category of prevention of injury to the arresting officer or of immediate destruction of evidence by the person arrested, normally associated with the phrase, "search incident to a lawful arrest".

handcuffed. The arresting officers saw marijuana in a blue bowl as the informer had told them they would together with cigarette paper, a scale and various types of pipes, all in plain view. Defendant Metzger was located in a bathroom down the hall, arrested and handcuffed.

The officers then proceeded directly to a rear bedroom and to the dresser which had been described by the informer. On opening its bottom drawer they found 16 bricks of marijuana, again exactly as the informer had predicted, together with various bags of clear plastic containing marijuana. Examination of the top drawer of the same dresser revealed some 20 barbiturates with a few bags of marijuana and more cigarette paper. There was also a balance scale on top of the dresser.

When defendants' motions to suppress were denied, each pleaded guilty. On appeal from the judgments of conviction the Appellate Division reversed, granting the motions to suppress as to the marijuana found in the dresser drawers. On the People's appeal to our Court we now reverse, concluding that the motions to suppress were properly denied *in toto*.

The issue before us is a relatively narrow one — was the seizure here of the marijuana in the closed drawers of the dresser illegal? We conclude that such seizure was lawful in the circumstances confronted by these arresting officers.

At the threshold we note that there was reasonable cause to sustain the warrantless arrests in the circumstances of this case (CPL 140.10). This is essentially a determination of fact, which

was made in favor of the People by the suppression court and affirmed at the Appellate Division and is beyond our review, unless such finding was erroneous as a matter of law. *(Peo. v Alexander,* 37 NY2d 202, 204; cf. *Peo. v Oden,* 36 NY2d 382.) We find no such error of law. Surely in the circumstances described above the police officers had reasonable cause to believe that a crime had just been committed in the apartment, namely, the sale of marijuana cigarettes to the informer. (Cf. *People v Montague,* 19 NY2d 121, 125.)

The real issue on this appeal is whether defendants' constitutional rights were infringed when, after the police had legally entered defendants' apartment and had precise and highly reliable information that there was a cache of narcotics in the bottom drawer of a dresser in the rear bedroom, they proceeded without a search warrant to seize the contraband to protect against the risk of its destruction or removal. We hold that under an exigency exception to the normal constitutional proscriptions, defendants' rights were not violated.[2]

The arresting officers had been told by the informer exactly where large quantities of marijuana were to be found. Developments prior to the seizure had fully substantiated both the credibility of the informer and the reliability of the

2. In so holding, we do not, as is suggested in the dissenting opinion, retreat from our holding in *People v Williams,* 37 NY2d 206. In that case we wrote, "The search was not conducted pursuant to a valid search warrant, or incidental to the completed arrest outside the searched premises, or with defendant's consent" (p 208). More notably the search was not directed to a particular location previously described and known to conceal contraband but was rather a rummaging search for a television set.

information he supplied. (Cf. *People v Montague, supra; United States v Wilcox,* 357 F Supp 514, 518-19.) Thus there was probable cause for the search and consequent seizure *(People v Slaughter,* 37 NY2d —— [decided October ——, 1975]; *People v Hendricks,* 25 NY2d 129, 133).

The conclusion that the police officers had probable cause for the search, however, does not end our inquiry. The critical issue is whether, assuming the existence of probable cause, it was lawful to conduct the search without first obtaining a warrant. Several years ago the issue was precisely framed in the United States Supreme Court:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. ***

"There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case. No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. *No evidence or contraband was threatened with removal or destruction,* ***." *(Johnson v United States,* 333 US 10, 13-15 [footnotes omitted and emphasis added].)

Crucial then to the legality of the warrantless seizure here is the coexistence of two factors, each significant for itself and more significant in combination. The first is the existence of what are referred to as exigent or exceptional circumstances. *(Coolidge v New Hampshire,* 403 US 443, 474-75.) The second is the fact that this seizure was specifically focused on a predetermined target, the predetermination of which was based on explicit information furnished by a known and still available individual whose reliability the police had currently substantiated (see *People v Montague, supra).* Most significant

the seizure was conducted to prevent the threatened disappearance of tangible evidence.

We conclude that there is ample proof in this record to support the finding by the suppression court that there were exigent circumstances. In the first place in dealing with narcotics the officers were obviously dealing with potentially readily disposable contraband, even in the quantities ultimately discovered in this case. (Cf. *United States v Davis,* 461 F2d 1026, 1032.) Secondly, on returning with only three marijuana cigarettes the informer both by his conduct and by his verbal statements to the police revealed his own anxiety and belief, following their questioning of him, that the sellers might have become suspicious of what was afoot. Indeed the informer appears to have been apprehensive for his own safety. Thirdly, but of less significance, the conduct of the officers reflected their own contemporaneous evaluation of the situation — that prompt police action was imperative. The apartment was entered without delay. Defendant Clements was arrested forthwith and promptly handcuffed. On locating defendant Metzger the officer immediately ordered him not to flush the toilet and promptly handcuffed him when he emerged. In sum the situation was sufficient to create, and evidently did create, a perceived likelihood that the marijuana of which the police had been informed might be destroyed.

As to the second factor, the informer, now confirmed as credible, had earlier located the particular dresser, had specifically identified the bottom drawer, and had described its contents. The selection of the target of the search was based on

direct evidence; no resort was had to inference. Significantly, we think, in this case there was not a wide-ranging, exploratory, rummaging, or routine search of the character condemned in *Chimel v California*, 395 US 752.

Our case should be viewed from the perspective of the police in the circumstances with which they were confronted. Having taken defendants into custody, the officers obviously had responsibility to take some action to prevent destruction or removal of the marijuana and drug paraphernalia. They would have been derelict in the performance of their duty as enforcement officers had they done nothing. Their right, indeed their obligation, to seize the contraband in plain sight is not questioned. The issue here relates to the bricks of marijuana in the bottom drawer of the dresser in the rear bedroom. The responsibility of the police was heightened by the fact that their knowledge of the existence of the contraband was grounded on particularized information rather than reasonable inference or general expectation.

Several alternatives were open. The police could have promptly seized the "evidence", as they did. Or they could have posted a guard inside the apartment and gone immediately to obtain a search warrant. Or they could have set an outside watch until a warrant could be obtained. To have taken no action on the scene pending application for a warrant would have been unacceptable.

It is suggested that rather than proceeding immediately to take possession of the concealed contraband, the police should

have maintained a surveillance of defendants' apartment for such period of time as would have been required to obtain a search warrant. The adoption of any such proposal, we suggest, as a practical matter, would necessarily have exposed these defendants to a much more objectionable intrusion than did the seizure here.

While such an alternative might be verbalized as only a "surveillance", on reflection one must be convinced that for the police merely to have manned an outside observation post would have been wholly inadequate to protect this contraband. As a practical matter the police would have had to take possession of defendants' apartment, including surely all means of ingress and egress. Any person entering or leaving the apartment would have had to have been at least stopped and probably then restrained. Control of the areas adjoining the dresser would have had to have been assured. In sum this proposal would have entailed a much greater intrusion in both space and time than that to which defendants were actually subjected.[3]

Nor, more notably, would defendants in such event have had the protection of an interposed appraisal of probable cause for the more extensive intrusion by any neutral or detached magistrate. Time and circumstance would no more have permitted postponement of police action to allow for presentation to a magistrate for this purpose than for issuance of a search warrant.

Confronted, as we think the officers here were, with the necessity to take some police action without delay, we cannot

3. Cf. Mr. Justice White dissenting in *Chimel v California, supra*, p 775, n 5.

conclude that the action they chose to take must be struck down as unlawful. Faced with alternatives, as to none of which could there have been any preliminary independent judicial scrutiny, we cannot think that a fair or sensible balancing of the competing private and public interests demands that the greater intrusion be preferred over the lesser. (Cf. *People v Kreichman*, —— NY2d —— [decided October ——, 1975]; *People v Perel*, 34 NY2d 462, 467; *United States v Evans*, 481 F2d 990.)

We hold that there was no infringement of the constitutional rights of these defendants. Other courts confronting similar factual situations have denied suppression. (E.g., *United States v Pino*, 431 F2d 1043, cert den 402 US 989; *United States v Lozaw*, 427 F2d 911; *State v Wiley*, 552 SW2d 281 [Sup. Ct. Mo. 1975].) They have not held themselves bound by the unreasonably simplistic concept of "grabbable reach" attributed to *Chimel, supra*. (See *People v Perel, supra*, p 467.)

In *Pino, supra*,[4] through a bathroom window an agent observed defendants measuring and mixing two white powders. When one defendant emerged from the apartment, he was arrested and an envelope of heroin was found on his person. Agents then entered the apartment, arrested the other defendant, proceeded to a rear bedroom, and seized therefrom the powders which had earlier been seen through the window. In upholding the search and seizure, Chief Judge Lumbard noted:

4. The statement in the dissent that the search in *Pino* was pre-*Chimel* is chronologically accurate but without significance. The court wrote: "Although this search was conducted nearly four years ago and is not governed by the standards set forth in *Chimel* ***, we believe that the search would have been proper even if it had occurred today." (431 F2d, at 1044.)

Delay in searching the apartment in this case would not only have been dangerous for the officer left to guard the apartment, but also would have greatly increased the likelihood that the heroin would either be destroyed or even more likely eventually find its way on to the streets. Thus this was a situation where, in the language used by Mr. Justice Stewart in *Chimel v California*, . . . "the inherent necessities of the situation at the time of arrest" . . . required an immediate search of the entire apartment for the narcotics still there.

> *** we think it clear that nothing in *Chimel* casts any doubt on the propriety of a search which is conducted under circumstances where an immediate and thorough search is imperative. (431 F2d at 1045.)

In *Lozaw, supra*, agents had observed a man from whom they had arranged to purchase narcotics emerge from defendants' apartment carrying a heavy suitcase. Agents immediately entered the apartment, arrested persons therein and seized narcotics found in the bathroom and living room. In concurring with the majority opinion sustaining the search and seizure, Chief Judge Lumbard noted:

> *** under all the circumstances which culminated in Lozaw's arrest, it was the clear duty of the agents to make the arrest and seizure

immediately, without a search warrant, and with the least possible delay.

***

While it is true that the search conducted by the agents went beyond "the area from within which he might have obtained either a weapon or something that could have been used as evidence against him," *Chimel, supra,* at page 768, 89 S. Ct. at 2043, it is also true that the search of the apartment had to be made immediately if the remaining marijuana was to be found. The agents could not know how many others were involved in the distribution of the marijuana; it could have been many more than the five men they had seen . . . . Any extended delay would increase the risk of danger to the officers from others who would soon be aware of what had happened and the risk that others would find some means of making away with the marijuana. (427 F2d at 917, 918.)

We note that in both *Pino* and *Lozaw* the searches sustained were in scope far greater than that with which we are here confronted and were not predicated on the particularized and specifically directed information on which the police here operated.

The Supreme Court of Missouri in *Wiley, supra,* recently confronted a factual circumstance almost identical to the one

here under scrutiny. In *Wiley* an anonymous informer passed to the police a tip that in a certain apartment drugs could be found in a refrigerator and that the occupants of the apartment were preparing to dispose of such drugs. Having taken all reasonable steps to verify the information, the police proceeded to the apartment, gained entry, arrested defendants, and proceeded immediately to search the refrigerator where the drugs were found exactly as had been predicted by the informer. The court sustained the warrantless search notwithstanding its recognition that pursuant to *Chimel* the search went "beyond the area of permissible search". The Court held:

> "We do not believe *Chimel* and its progeny control the situation here. The thrust of *Chimel* was that the arrest of a person at home could not justify a routine search. *Chimel* did not involve a situation where the officers, having certain information, searched a particular area for particular evidence. In *Chimel,* there was no indication of circumstances which indicated to the officers that removal or destruction of the evidence was imminent or threatened. Nowhere in the opinion does the Court suggest that exceptional circumstances existed by which evidence was threatened to be removed or destroyed.
>
> "In this case there was evidence that such circumstances existed when the officers had to determine whether to proceed without warrant or

> wait until a warrant could be obtained. Under all the evidence we believe that the exceptional circumstances existed and therefore the search and seizure of the controlled substances was not an unreasonable one — the ultimate test under the Constitution as to whether the search and seizure was impermissible." (522 SW2d at 291.)

The difficult problem of determining when the exigency of threatened removal or destruction of contraband will justify departure from the general requirement that arrests and searches and seizures proceed only on duly issued warrants has, of course, received extensive treatment by other courts in other factual contexts. The problem has only been exacerbated by the absence of any Supreme Court elucidation of the issue. The United States Court of Appeals, Third Circuit, in directly confronting the question recently noted that the "Supreme Court has never spoken in a case such as this one where the searching officers know there is in fact a large quantity of contraband narcotics in a dwelling, and they are apprehensive that it may be removed or destroyed" *(United States v Rubin,* 474 F2d 262, 268, cert den, *sub nom. Agran v United States,* 414 US 833). The *Rubin* court concluded that where "Government agents . . . have probable cause to believe contraband is present and, in addition, based on the surrounding circumstances or the information at hand, they reasonably conclude that the evidence will be destroyed or removed before they can secure a search warrant, a warrantless search is justified." *(Id.)* Recognizing that the emergency circumstances will vary from case to case, the court went on to list some of the circumstances which in the past have seemed relevant to the courts:

> "(1) the degree of urgency involved and the amount of time necessary to obtain a warrant, *compare United States v. Pino,* 431 F.2d 1043, 1045 (2d Cir. 1970), with *Niro v. United States,* 388 F.2d 535 (1st Cir. 1968);
>
> "(2) reasonable belief that the contraband is about to be removed, *United States v. Davis,* 461 F.2d 1026, 1030 (3d Cir. 1974); *Hailes v. United States,* 267 A.2d 363 (D.C.C.A. 1970);
>
> "(3) the possibility of danger to police officers guarding the site of the contraband while a search warrant is sought, *United States v. Pino,* 431 F.2d at 1045;
>
> "(4) information indicating the possessors of the contraband are aware that the police are on their trail, *United States v. Doyle,* 456 F.2d 1246 (5th Cir. 1972); and
>
> "(5) the ready destructibility of the contraband and the knowledge 'that efforts to dispose of narcotics and to escape are characteristic behavior of persons engaged in the narcotics traffic,' *United States v. Manning,* 448 F.2d 992, 998-999 (2d Cir. 1971); *United States v. Davis,* 461 F.2d at 1031-1032." (474 F2d at 268-69.)

We conclude that, in the totality of the circumstances presented by this case coupled with the fact the police here did not engage in a rummaging or general search but rather searched only the bedroom bureau which had been particularly described by the informer as where the contraband was located, the police here were justified in searching beyond the narrow reach defined by *Chimel*.[5]

Accordingly the order of the Appellate Division should be reversed. Because the disposition there was on the law, the case must now be remitted to that Court for review of the facts (CPL 470.40 [2] [b]).

PEOPLE v. CLEMENTS & METZGER
Case #373

WACHTLER, J.: (Dissenting)

I dissent and would affirm the order of the Appellate Division. The dire prophecy of Mr. Justice Frankfurter in *United States v. Rabinowitz* (339 US 56,80) has come to pass. The exceptions have finally consumed the rule. The majority holds today that the police may search an arrestee's home as

5. We note that *Coolidge v New Hampshire*, 403 US 443, *Vale v Louisiana*, 399 US 30, *United States v Jeffers*, 342 US 48, and *Agnello v United States*, 269 US 20, cases relied on in the dissenting opinion, were all concerned with unlawful *initial* intrusions raising issues not here present where there can be no doubt that the entry into defendants' apartment was lawful. (See particularly, *Coolidge*, *supra*, pp 455-56; *Vale*, *supra*, pp 33-34; *Agnello*, *supra*, pp 30-31.)

long as they have a reasonable belief that evidence is present and that they refrained from a more outrageous intrusion. This holding adopts the rule of *Harris v. United States* (331 US 145) and *United States v. Rabinowitz, supra,* which was expressly overruled by the Supreme Court in *Chimel v. California* (395 US 752) and contravenes the tightly guarded exception articulated in *Chimel*. Consequently, the majority opinion extends the concept of search incident to arrest far beyond the limits permissible under the Constitution. Indeed, the majority lacking conventional authority has seen fit to spawn a new rubric — search consequential to arrest. Interestingly, this radical departure from established principles (see, e.g., *People v. Chiagles*, 237 NY 193 [Cardozo, J.] and cases cited therein) was accomplished without reference to New York Authority.[1]

The right of the people to be secure from unreasonable searches and seizures is enunciated by the Constitution (U.S. Const., 4th Admt; NYS Const., Art I §12). The Supreme Court has declared that warrantless searches are per se unreasonable

1. Throughout the entire majority opinion a paucity of New York cases are cited. Both *People v. Slaughter*, —— NY2d ——, dec'd October —— 1975 and *People v. Hendricks*, 24 NY2d 129, are cited solely for a proposition that is not a subject of controversy in this case. Ironically both *Slaughter, supra,* and *Hendricks, supra,* involved searches pursuant to search warrants and dealt only with the sufficiency of the supportive affidavits.

Similarly, *People v. Montague*, 19 NY2d 121, another search warrant case, and *People v. Kreichman*, —— NY2d —— decided October —— 1974 are inapposite because they only considered whether or not probable cause existed. The last case, *People v. Perel*, 34 NY2d 462, as I point out in the text, directly supports my analysis that the "greater:lesser" intrusion analysis extends only to the personal effects of the arrestee.

(Coolidge v New Hampshire, 403 US 443, 454; *Chimel v. California, supra).* Despite this unequivocal declaration, there are certain exceptions which are recognized in deference to practical realities. These exceptions, however, are "jealously and carefully drawn" *(Jones v. United States,* 357 US 493, 499) and "tightly guarded" *(Katz v. United States,* 389 US 347, 357). Before proceeding to my consideration of the exception presented here, two fundamental aspects of this constitutional doctrine must be noted. First, it is conceptually untenable to justify a warrantless search or seizure in the absence of exigent circumstances *(Coolidge, supra,* at 471). "Belief, however well-founded that an article sought is concealed in a dwelling house, furnishes no justification for a search of the place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause" *(Agnello v. United States,* 269 US 20, 33). Second, where a warrantless search or seizure has been effected and the evidence thus acquired is challenged, the burden is on the state to show the existence of an exceptional situation justifying the police action *(Vale v. Louisiana,* 399 US 30; *Coolidge, supra,* at 354-355). In the instant case the People contend the warrantless search of defendants' apartment and seizure of contraband in the bedroom was justifiable as incident to their arrest.

The People voice two propositions in support of their theory which may be synthesized as follows. First they contend that narcotics are easily disposed of and transported, therefore time was of the essence. Apparently, they would have our Court fashion a rule which would dispense with the warrant requirement whenever narcotics are involved. This is a patently

unacceptable approach. Next, the People assert that defendants were "apparent members of the drug culture" who lacked roots in the community, consequently police action was imperative lest the narcotics disappear. This argument is absolute speculation. Not only has there not been a finding of fact in this regard but the record is totally devoid of evidence with respect to defendants' subculture affinities or connection to the community. In the face of such specious attempts to rebut the presumptive unreasonableness of the instant search, it is hard to comprehend the majority's conclusion.

Nevertheless the Court somehow finds exigency by virtue of the nature of the evidence, the informer's anxiety and the subjective, albeit groundless, conclusion by the police that action was imperative. The majority bolsters the dubious exigency by rationalizing that any alternative course of action would have been a greater intrusion of the defendants' rights.

I disagree with both aspects of the majority opinion. The search here was not justifiable as incident to arrest, nor on the grounds that police action was imperative.

A search 'incident to arrest' is strictly limited to the defendants' "grab area" *(Chimel, supra).* The justification for this exception is predicated on the fact that an arrested person is likely to destroy any incriminating evidence or to use available means to effect an escape. To the extent that both possibilities represent stark reality, a warrantless search is permissible; where these possibilities do not exist a warrantless search is not permissible. In accordance with the practical considerations the

grab area has been interpreted to mean the area within the defendant's reach at the time of arrest and any personal effects within that area. Recent Supreme Court cases comport with this interpretation. (See, e.g., *Cupp v. Murphy*, 412 US 291 [scraping of underside of defendant's fingernails when it appeared that he was attempting to destroy evidence upheld as incident to arrest]; *United States v. Edwards*, 415 US 800 [search of defendant's clothes, after incarceration, for paint chips upheld as incident to arrest]; *Vale v. Louisiana, supra*, [search of defendant's house after he was arrested outside held violative of constitutional rights]; see also *United States v. Robinson*, 414 US 218.) New York cases have adopted a similar interpretation of *Chimel*, one which is strictly limited to a search of the defendant *(People v. Troiano*, 35 NY2d 476; *People v. Marsh*, 20 NY2d 98); the premises within the arrestee's immediate control *(People v. Brosnan*, 32 NY2d 123; *People v. McKnight*, 26 NY2d 1034); or the defendant's personal effects which were within his dominion at time of arrest *(People v. Darden*, 34 NY2d 177, [attache case]; *People v. Weintraub*, 35 NY2d 351, [attache case]; *People v. Perel*, 34 NY2d 462 [personal notebook]).

Since *Chimel*, neither the Supreme Court nor our Court has ever sustained a search incident to arrest which extended beyond the area within the defendant's immediate control. In such a situation it can hardly be said that the arrestee is capable of grabbing a weapon or destroying evidence. As Chief Judge Breitel noted in *Perel* "[A]n arrest of a person will not justify a search of an entire home or other area in which he maintains a reasonable expectation of privacy, the arrest not withstanding." *(People v. Perel*, 34 N.Y.2d, *supra*, at 468). Indeed this

fundamental principle was reaffirmed by our Court just last session. In *People v. Williams*, 37 N.Y.2d 206, we declared that the warrantless search of defendants' living room and bedroom after he had been arrested and handcuffed in the foyer was unconstitutional.[2] (See, also, *People v. Velez*, 43 AD2d 745, 746, where it was held that the police exceeded permissible limits in searching a second room of the apartment at a time when the two occupants were in one room and apparently under the control of five officers.) The mere fact that an arrest has been made may not be used as a pretext for a search beyond the grab area (see, *United States v. Lefkowitz*, 285 US 451; *Chimel, supra;* but see *Chimel, supra* at 780 [White, J., dissenting]). Had defendants been arrested outside the apartment, a search of the bedroom would clearly violate their constitutional rights (*Vale v. Louisiana, supra, People v. Loria*, 10 NY2d 368). Surely, this constitutional protection does not rest on so fortuitous a circumstance as the defendants' location (*Trumpiano v. United States*, 334 US 707, 708).

Applying these principles to the case at bar, the arresting officers were authorized to search the area near the entrance, the area within Clements' reach, and the bathroom, Metzger's grab area. Both defendants submitted to arrest without the slightest protest (this was especially unusual as to the first defendant who was interrupted while indisposed in the bathroom). Both were immediately handcuffed and guarded in the living room by the police. By no stretch of the *Chimel* doctrine could the dresser in the bedroom, which was concedely unoccupied at all times, be

2. In its memorandum, our Court noted "Defendant was arrested and handcuffed in the hallway adjoining the door of his apartment, or immediately inside the door in the foyer."

searched as incident to arrest (see, *People v. Williams, supra; People v. Velex, supra*).

Turning to the second apparent basis for the majority's holding, I find this record devoid of any indication that the contraband was in danger of being destroyed. Although experience teaches of the easy disposability of narcotics, that does not justify making the mere presence of drugs an exigency. It is difficult to conceive of narcotics which may not be readily destroyed. The appropriate solution for this problem is a no-knock search warrant (CPL § 690.50),[3] not the course suggested by the majority. Moreover, the mere hearsay statement that the informer was anxious while purchasing the drugs is susceptible of varying interpretations and without something concrete hardly indicative of impending flight or destruction of evidence by the defendants.

The decisional law on this subject accords with this view. *People v. Torres*, 45 AD2d 185, is in point. There, the police had been informed that heroin was being sold from defendant's apartment and would probably be sold out by morning. A subsequent warrantless search and seizure was declared illegal by the Appellate Division which noted the total lack of traffic in or out of the apartment and lack of indication that there was any threat that the narcotics were to be destroyed. (See also, *State v. Wiley*, 522 SW2d 281, where the informer, whose information had been verified to a great degree, told the police that the defendants planned to depart as soon as they finished dinner; *Williams v. State*, 331 Atl 2d 380, where the police knew a major

3. But see, 21 USCA 879, repealed Pub. L. No. 93-481

narcotics purchase was being conducted in a motel and both buyers and sellers would depart after the negotiations were concluded; *State v. Miller*, 528 P2d 1082, search upheld where informer, after agreeing with police to buy drugs, emerges from house for more money and a lookout within the house is watching.) Thus, in light of this record, which contains virtually nothing to support a reasonable belief that the defendants or the marijuana were likely to vanish, the instant search is unjustifiable.

Turning to the premise that the police subjectively evaluated the situation and concluded that further police action was imperative, there is nothing to support that conclusion. The police knew that no one else was in the apartment so there was no apparent danger to the drugs in the bedroom. (See, e.g., *United States v. Rubin*, 474 F2d 262, where suspects were inside the building in question, and the police were aware of a specific attempt by someone outside to warn them of their peril. See also *Ker v. California*, 374 US 23, 42; 83 S.Ct. 1623, 10 L.Ed. 2d 726 [1963], occupant of apartment might distribute or hide drugs; *Theobald v. United States*, 371 F2d 769, people inside the room might destroy the evidence; *Dorman v. United States*, 140 U.S. App. D.C. 313, 435 F.2d 385, armed fugitive believed to be inside residence; *United States v. Bradley*, 455 F2d 1181, suspects in the midst of a narcotics transaction; *United States v. Davis*, 461 F2d 1026, suspects in dwelling in the midst of cutting heroin preparatory to going out on the street with it; *United States v. Evans*, 481 F2d 990, specific risk that a suspect would get a warning and act to destroy evidence; *State v. Patterson*, 192 Neb. 308, 220 NW2d 235, suspects inside and attempts to

arrest as they left singly could alert those inside.) *Vale, supra,* is particularly instructive in this regard. There a search of defendant's house was declared illegal despite the fact that defendant's mother and brother were on the premises and could conceivably destroyed or removed evidence. Nor was there anything to indicate the existence of confederates lurking about in order to spirit away the remaining drugs, or that others had been or could be informed of the arrest and act to eliminate the proof (see, e.g., *Commonwealth v. Forde,* 329 NE2d 717). Furthermore the evidence was not of such a perishable nature as to necessitate an immediate seizure (e.g., *Schmerber v. California,* 384 US 757). Here, the police were operating on the scanties of information, the word of a previously unknown 17 year old informant[4] who they casually met carrying a bucket of paint across Sears' parking lot. They did nothing to check the ownership of the apartment or ascertain the extent of the operation they were infiltrating despite the fact that it was located in a precinct 15 miles from the one to which they were assigned. It is clear therefore the conduct of the officers can hardly be characterized as reasonable and that the sole factor relied on by the officers, the informer's expression of anxiety, was insufficient to render police action imperative.

As if sensing the inadequacy of and lack of authority for their primary justifications, the majority supplements their reasoning by resort to the premise that once defendants were

4. There is nothing in the record to indicate that the police knew where informer lived or whether his identity was verified. Apparently the informer lacked identification thereby making it impossible for the police to establish that he had given them his correct name. Such an informer can hardly be characterized as "available".

arrested, subsequent invasions of privacy are relatively minor when compared to alternative courses of action. Initially, and most significantly, I would note that this reasoning fails to recognize the "high function" played by the search warrant. It is not merely a formality to be dispensed with to accommodate the police *(Agnello, supra,* at 33; *United States v. Jeffers,* 342 US 48, 51). As noted in *Coolidge (supra,* at 470) inconvenience caused by the warrant requirement is not constitutionally cognizable. Rather the Constitution is designed to place the objective evaluation of a neutral magistrate between the citizenry and the police so as to secure the individual against arbitrary intrusion by the state. Merely precluding the introduction of evidence seized without probable cause will not achieve that objective. (Otherwise, warrants will be necessary only when the police lack probable cause.) Thus if the constitutional guarantee is to have substance, violations must be prevented, not simply redressed *(Chimel, supra,* at 766, n.12; *Coolidge, supra,* at 450-451). The right against unlawful search and seizure must be protected even though the same result might have been accomplished in a lawful manner *(Silverthorne Lumber Co. v. United States,* 251 US 385, 392).

Accordingly, where a party's constitutional rights have been trammelled, mere speculation as to what greater intrusion he was spared will not transform an illegal search and seizure into a legal one. To do so would be the equivalent of saying that a guilty person need not be afforded a fair trial. That is abhorrent to our jurisprudence and something we have never deigned to do *(People v. Alicea,* —— NY2d ——, dec'd October —— 1975).

Upon close analysis it is clear that the "greater:lesser" intrusion analysis stems from those cases considering the personal effects of the arrestee and the so-called inventory search cases (see, e.g., *United States v. Edwards, supra; People v. Perel, supra; People v. Weintraub, supra; Cardwell v. Lewis*, 417 US 583; *People v. Sullivan*, 29 NY2d 69), and only comes into play where the defendant's expectation of privacy has ceased. Here the defendants retained a reasonable expectation of privacy as to the rear bedroom, so the search of the dresser located in the bedroom was unconstitutional *(Peo. v. Perel, supra)*.

I would also note that the cases from outside our jurisdiction, on which the majority relies heavily, are of questionable validity as applied to our State's constitutional protection and are in any event readily distinguishable. *United States v. Pino* (431 F2d 1043, cert den. 402 US, a pre-*Chimel* case, involved an arrest effected at 1:00 a.m. in a high crime area where it would have been dangerous to post a guard. In addition Pino himself told the officers that the drugs were in the bedroom. Clearly the instant case where the arrest occurred in the middle of the afternoon in a garden apartment complex in residential Long Island lacks the sense of urgency present in *Pino*. Similarly, *United States v. Lozaw*, 427 F2d 911, which was also decided before the standard articulated in *Chimel* was applicable, is distinguishable on its facts by virtue of the fact that there were possible confederates and a statement by one of the arrestees that the narcotics were to be moved later.

I cannot agree that surveillance or placing a guard amounts to a greater intrusion. In *United States v. Jeffers* (342 US 48) a

search similar to the one before us was held invalid where the police entered defendant's premises for the sole purpose of seizing contraband rather than merely placing a guard at the door (but cf. *Cady v. Dombrowsky*, 413 US 433). Nor may the majority take solace as they seem to do, in the fact that the search here was narrow in scope, i.e. limited to the dresser drawer. In the first place, these police did not limit the search to the predetermined target. In addition to searching the bottom drawer of the dresser they searched the top drawer (finding barbiturates which resulted in a separate count) and apparently looked in other areas of the apartment in a vain search for the marked five-dollar bill which the informer left in the apartment. Secondly, an unconstitutional search no matter how meticulously conducted is unconstitutional nonetheless. Had the police been so meticulous in the performance of their sworn duties, this case never would have arisen. Moreover, the majority erroneously extrapolates the concept of predetermined target which was articulated in a different context in *People v. Hansen*, (—— NY2d ——, dec'd October —— 1975). To justify the search at bar on the ground that it focused on a predetermined target would seem to resurrect the approach rejected by the United States Supreme Court in *People v. Sibron*, 18 NY2d 603, rev'd 392 US 40.

By spelling the demise of *Chimel* the majority has eliminated a sound rule which was capable of universal understanding; thereby inviting a new era of ad hoc determinations. Even more unfortunate, however, is that the home has been stripped of its once secure position and is now at the mercy of and fair game for governmental intrusion and expediency.

Opinion of State of New York Court of Appeals

In view of the foregoing I would affirm the order of the Appellate Division.

* * * * * * *

Order reversed and the case remitted to the Appellate Division, Second Department, for further proceedings in accordance with the opinion herein. Opinion by Jones, J. All concur except Wachtler, J., who dissents and votes to affirm in an opinion in which Fuchsberg and Cooke, JJ., concur.

Decided October 28, 1975

OPINION AND DECISION OF APPELLATE DIVISION SECOND DEPARTMENT

(March 11, 1974)

44 A.D.2d 572

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

JOHN CLEMENTS and MARK METZGER,

Defendants-Appellants.

Appeal by defendants from two judgments (one as to each defendant) of the County Court, Nassau County, rendered May 21, 1973, convicting them of criminal sale of a dangerous drug in the fourth degree, upon their pleas of guilty, and imposing sentence.

Judgments reversed, on the law, and defendants' motion to suppress certain evidence granted as to the marijuana found in the chest of drawers.

"After indicating to two policemen that he knew where they could purchase large amounts of marijuana, a named informer was used by the police to make a purchase. When the informer came out of the apartment house where the purchase was made, he had three "joints" of marijuana.

Opinion and Decision of Appellate Division Second Department (March 11, 1974)

He told the police where he had made the purchase and described the layout of the apartment, telling them that there was a large amount of marijuana in a bureau drawer in a back bedroom.

The police gained entry to the apartment and arrested the defendant who answered the door. In the room first entered there was a blue bowl containing marijuana in open view. The second defendant was found in the bathroom and was arrested. One of the policemen then went to the chest of drawers described by the informer, opened the drawers, and seized a quantity of marijuana.

In our opinion, the police had reasonable grounds to arrest defendants. Thus, the contraband in open view, i.e., the marijuana in the blue bowl, was the subject of a valid seizure incident to an arrest (Chimel v. California, 395 U.S. 752). However, the marijuana in the dresser was not lawfully seized and the motion to suppress should have been granted as to this portion of the contraband.

The People presented no evidence to rebut the presumption of unreasonableness that attaches to a warrantless search (Coolidge v. New Hampshire, 403 U.S. 443) and there is nothing in the record from which we can say that the People sustained their burden of proving that compelling exigencies made immediate seizure mandatory (United States v. Jeffers, 342 U.S. 48)."

LATHAM, Acting P.J., SHAPIRO, COHALAN, CHRIST and MUNDER, J.J., concur.

ADDITIONAL AMENDED DECISION OF APPELLATE DIVISION

(June 12, 1974)

45 A.D.2d 733

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

MARK A. METZGER and JOHN P. CLEMENTS,

Appellants.

On the court's own motion, its decision (220E, 221E) dated March 11, 1974, which was amended by this court's decision (No. 128 Amd. Dec.) dated June 4, 1974, is further amended by striking from the portion which, by said order of June 4, 1974, was added to the end of said original decision the words "in the interests of justice".

LATHAM, Acting P.J., SHAPIRO, COHALAN, CHRIST and MUNDER, JJ., concur.

ORDER OF APPELLATE DIVISION APPEALED FROM

(March 11, 1974)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on March 11, 1974.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

MARK METZGER AND JOHN CLEMENTS,

Appellants.

HON. HENRY J. LATHAM,
Acting Presiding Justice.

HON. J. IRWIN SHAPIRO
HON. JOHN P. COHALAN, JR.
HON. MARCUS G. CHRIST
HON. FRED J. MUNDER,
Associate Justices.

In the above entitled action, the above named Mark Metzger and John Clements, defendants, having appealed to this court from two judgments (one as to each defendant) of the County Court, Nassau County, rendered May

Order of Appellate Division Appealed From
(March 11, 1974)

21, 1973, convicting them of criminal sale of a dangerous drug in the fourth degree, upon their pleas of guilty, and imposing sentence; and the said appeal having been argued by Alan Manning Miller, Esq., of counsel for the appellants, and argued by Jules E. Orenstein, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the two judgments appealed from are hereby unanimously reversed, on the law, and defendants' motion to suppress certain evidence granted as to the marijuana found in the chest of drawers.

ENTER:

Clerk of the Appellate Division.
IRVING N. SELKIN

AMENDED DECISION OF APPELLATE DIVISION

(June 4, 1974)

45 A.D.2d 719

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

MARK METZGER AND JOHN CLEMENTS,

Appellants.

On the court's own motion, its decision (220 E, 221 E), dated March 11, 1974, is amended as follows:

The second paragraph of the decision is amended to read:

> "Judgment reversed, on the law, defendants' motion to suppress certain evidence granted as to the marijuana found in the chest of drawers, and case remanded to the County Court for proceedings in accordance with this decision."

The following is added to the end of the decision:

> "The indictment contained three counts: (1) criminal sale of marijuana in the second degree (a class B felony); (2) criminal possession of marijuana in the third degree (a class C felony); and (3) criminal possession of barbiturates in the sixth degree (a

class A misdeameanor). On the denial of the motion to suppress in the County Court, defendants pleaded guilty to criminal sale of a dangerous drug in the fourth degree (a class D felony) in satisfaction of the indictment. Since the motion to suppress is now being granted only as to part of the evidence involved in the second count (criminal possession), the plea of guilty to the crime of criminal sale would ordinarily lead to affirmance of the judgment. However, since the plea of guilty may have been induced by the complete denial by the County Court of the motion to suppress, and since defendants' counsel stated to this Court on May 29, 1974 that he wished to have the plea withdrawn in view of the court's decision, in the interests of justice the judgment is reversed without prejudice to defendants' moving in the County Court for withdrawal of their plea of guilty, which application, if made, should be granted."

Latham, Acting P.J., Shapiro, Cohalan, Christ and Munder, JJ., concur.

AMENDED ORDER OF APPELLATE DIVISION SECOND DEPARTMENT

(June 4, 1974)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 4, 1974.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

MARK METZGER AND JOHN CLEMENTS,

Appellants.

HON. HENRY J. LATHAM,
Acting Presiding Justice.

HON. J. IRWIN SHAPIRO
HON. JOHN P. COHALAN, JR.
HON. MARCUS G. CHRIST
HON. FRED J. MUNDER,
Associate Justices.

In the above entitled action, the above named Mark Metzger and John Clements, defendants, having appealed to this court from two judgments (one as to each defendant) of the County Court, Nassau County, rendered May 21, 1973;

Amended Order of Appellate Division Second Department (June 4, 1974)

Now, on the court's own motion, it is

ORDERED that its decision (220 E, 221 E, dated March 11, 1974 is hereby amended in accordance with the decision of this court dated June 4, 1974, and pursuant to said decision of June 4, 1974 the order of this court dated March 11, 1974 is amended to read as follows:

In the above entitled action, the above named Mark Metzger and John Clements, defendants, having appealed to this court from two judgments (one as to each defendant) of the County Court, Nassau County, rendered May 21, 1973, convicting them of criminal sale of a dangerous drug in the fourth degree, upon their pleas of guilty, and imposing sentence; and the said appeal having been argued by Alan Manning Miller, Esq., of counsel for the appellants, and argued by Jules E. Orenstein, Esq., of counsel for the respondent, and due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the two judgments appealed from are hereby unanimously reversed, on the law, defendants' motion to suppress certain evidence granted as to the marijuana found in the chest of drawers, and case remanded to the County Court for proceedings in accordance with this court's decision.

ENTER:

IRVING N. SELKIN
Clerk of the Appellate Division.

SECOND AMENDED ORDER OF APPELLATE DIVISION

(June 12, 1974)

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 12, 1974.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

MARK A. METZGER and JOHN P. CLEMENTS,

Appellants.

HON. HENRY J. LATHAM,
Acting Presiding Justice.

HON. J. IRWIN SHAPIRO
HON. JOHN P. COHALAN, JR.
HON. MARCUS G. CHRIST
HON. FRED J. MUNDER,
Associate Justices.

In the above entitled cause, the above named Mark Metzger and John Clements, defendants, having appealed to this court from two judgments (one as to each defendant) of the County Court, Nassau County, rendered May 21, 1973;

Second Amended Order of Appellate Division
(June 12, 1974)

Now, on the court's own motion, it is

ORDERED that its decision (220 E, 221 E) dated March 11, 1974, which was amended by this court's decision dated June 4, 1974, is hereby further amended by striking from the portion which, by said order of June 4, 1974, was added to the end of said original decision the words "in the interests of justice".

ENTER:

IRVING N. SELKIN
Clerk of Appellate Division

SECOND AMENDED DECISION

N.Y.L.J., June 17, 1974, p. 18, col 6.
App. Div., Second Dept
Re: *People* v. *Mark Metzger and John Clements*

By Latham, Acting P.J.;

Shapiro, Cohalan, Christ and Munder, JJ.

PEOPLE & C., res. v. MARK METZGER and JOHN CLEMENTS, ap—On the court's own motion, its decision (220E, 221E) dated March 11, 1974, which was amended by this court's decision (No. 128 Amd. Dec.) dated June 4, 1974, is further amended by striking from the portion which, by said order of June 4, 1974, was added to the end of said original decision the words "in the interests of justice."

FINDINGS OF FACT AND CONCLUSION OF THE TRIAL COURT

MINUTES OF SEARCH AND SEIZURE HEARING

In Chambers:

(Present: The Court and John Reddan, Esq., Law Secretary of the Court.)

The Court: These defendants were indicted for the crimes of criminally selling a dangerous drug in the second degree, it being specifically alleged that they sold marijuana to a person less than 21 years of age.

Colloquy between Court and Counsel

They were further indicted as a second count of the crime of criminal possession of a dangerous drug in the third degree, it being stated that they possessed more than one ounce of marijuana.

Finally, and as a third count, they were charged with criminal possession of barbiturates, a misdemeanor.

The defendants themselves swore to an affidavit wherein they claimed that while they were in their apartment premises in Oceanside, Police Officers burst into their rooms and seized the marijuana and other objects which are sought to be used as evidence against them upon the trial of this indictment.

A hearing was demanded and ordered to be held.

The hearing, held for the purpose of determining whether the said evidence should be suppressed, was conducted on March 19th, 1973.

The People produced the following witnesses: Detective James Reed and Patrolman James Gardner, both members of the Crime Prevention Unit of the Nassau County Police Department.

The defendants did not offer any testimony.

The Court makes the following findings of facts and conclusions of law: That both Detective Reed and Patrolman Gardner were experienced and familiar with the appearance of marijuana.

On August 3rd, 1972, they encountered a boy named George Boss, 17 years of age, in the Sears

parking field at Hicksville, New York. Neither one of them knew him before that day.

Boss, as a result of a conversation with them, told them that he knew where he could buy marijuana in Oceanside.

These two Detectives accompanied by a fellow Officer, Mr. Knox, and Boss, traveled to premises 2930 Rockaway Avenue in Oceanside, New York.

At this time, they searched Boss for the purpose of determining if he had any marijuana on his person. The above mentioned premises consist of a group of buildings two stories in height each containing a number of apartments. And Boss entered the one known by the street number 2930 Rockaway Avenue.

After five to eight minutes, he returned to them and handed them three marijuana cigarettes. These objects are contained in the Exhibit marked upon this hearing as People's Exhibit 8, for identification.

Detective Reed and Patrolman Gardner then went into this apartment house, traveled to the second floor, went down the hallway to apartment Number 8, and Gardner knocked on the door.

A voice within answered, and Gardner responded that Jimmy was there.

The door was then opened by the defendant Clements. The door was approximately two and a half to three feet in width and it was opened to such an

extent so as to permit full access to a hallway. This hallway in turn was about four feet in length and opened on to a living room.

Gardner entered the hallway ahead of Reed, and both of them while in the hallway were able to observe two-thirds of the living room, specifically the western portion of it.

Upon entering the hallway the Detective told Clements that he was under arrest for selling marijuana.

While so positioned, Detectives Reed and Gardner were able to observe a blue bowl about twelve feet away from them on a large wire reel serving as a coffee table. They further observed that the bowl contained a greenish material which they believed was marijuana based upon their experience and expertise as police officers. This bowl and its contents were marked as Exhibit 7, for identification upon this hearing.

When George Boss had returned from his visit to the apartment, he told Gardner and Reed that there was marijuana in a bottom bureau drawer in the rear bedroom.

Reed, after placing Clements under arrest for the sale of marijuana to Boss, and after observing the marijuana in the blue bowl on the coffee table, went directly to the rear of the apartment, opened the door and saw the defendant Metzger sitting on the toilet bowl. Metzger yelled at him, "get the hell

out of here". He in turn ordered Metzger not to flush the toilet.

Reed stated that he then went into the rear bedroom, observed barbiturates on the top of the bureau and opened the bottom drawer of this bureau and found this filled with marijuana bricks.

The marijuana bricks and amphetamines referred to were marked upon this hearing as being contained in Exhibits 8 and 9, for identification.

Reed and Gardner then took these defendants to the Fourth Precinct Stationhouse.

Conclusions of law: As to the three marijuana cigarettes, being the marijuana referred to in the first count of the indictment, it is found that these cigarettes were given by George Boss to the Police Officers on the public street and are thus, not the subject of a suppression hearing. They may, therefore, be used as evidence upon the trial of the indictment.

As to the marijuana taken from the Apartment Number 8, that portion of it which was contained in the blue bowl in the living room was contraband in open view of the Detectives, observed by them while they were in the process of making an arrest and was thus, properly seized. It may be used as evidence upon the trial of this indictment.

As to the marijuana contained in the bureau drawer in the rear bedroom and contained in Exhibits marked 8 and 9 upon this hearing, it is found that the police officers had reason to believe that the marijuana was inside the bureau drawer by reason of the statement made to them by Boss. They were entitled to rely upon this statement because Boss had proven himself to be reliable when he had completed the purchase of the three marijuana cigarettes. That the knowledge by Clements and Metzger that they were under arrest would, even though they were in custody, have been sufficient to create a likelihood that they or others working at their direction would destroy the evidence or contraband represented by the marijuana in the bureau drawer.

That exigent circumstances with regard to the destruction of this contraband existed and the Officers were justified in making a seizure of it.

That as such, the Officers were not required nor indeed could they stop their police activity and seek a search warrant as to the bureau drawer. Scimel against California, 395 U.S. 752 is in this sense not applicable to the facts that were testified to by the People's witnesses.

(Whereupon, the proceedings in chambers were concluded.)"

(Recess.)

(After recess.)

Colloquy between Court and Counsel

The Clerk: People versus John Clements and Mark Metzger.

Mr. Slavis: People ready.

Mr. Miller: Defendant ready.

The Court: You will recall, gentlemen, when we recessed yesterday, the hearing was marked concluded. I have rendered findings of fact and conclusions of law. Due to the fact, of course, that the hearing was completed yesterday afternoon, we have been unable to transcribe them. For that reason, I have dictated these findings and conclusions to the Official Reporter. He will read them to you. And then I will have them transcribed so they may be in writing and part of the Court folder and represent an order as to the hearing.

Mr. Arianas, read the Court's findings and conclusions of law.

(Above referred to information read back by the Reporter.)

The Court: All right. That represents the findings off acts and conclusions of law, gentlemen. We will resume with this matter, Mr. Miller, after I call the sentence calendar.

(Whereupon, the above hearing was concluded.)

Certified as a complete and accurate transcript.

/s/ Edward Arianas
Edward Arianas, C.S.R.